

9 Defendant Jose Cuevas Estrada (Cuevas Estrada) has filed
10 several motions in *pro per* with the Court. On March 2, 2011
11 Defendant filed a Motion to Dismiss the Information and on
12 March 8, 2011 Defendant filed a Motion to Dismiss the
13 Indictment. On April 4, 2011 Defendant also filed a Motion
14 Requesting a Ruling on his two prior motions. Having
15 considered the papers submitted, the applicable law, and the
16 record in this case, the Court hereby denies Defendant's
17 motions.

18 || I. Background

Defendant is before the Court on an alleged violation of
8 U.S.C. § 1326, Illegal Reentry following deportation.
Defendant's Motions before the Court allege that he could not
have been charged by way of an Information and that the
Indictment must be dismissed because of alleged Speedy Trial
Act violations having to do both with his arrest and with the
exclusions of time since that point. Finally Defendant argues
that the Information should be dismissed based on alleged
ineffectiveness of prior counsel.

28 Defendant was deported in February 1999, April 2006 and
July 2006. He was found in the United States this time on or

1 about August 24, 2010 when he was in the custody of the Santa
2 Clara County Jail. An Immigration Detainer was lodged on
3 Defendant on August 24, 2010 at the Santa Clara County jail.

4 On November 10, 2010 a Criminal Complaint was filed
5 against Defendant in the United States District court alleging
6 a violation of 8 U.S.C. § 1326. A warrant for the Complaint was
7 issued. Defendant was arrested and initially appeared before
8 Magistrate Judge Trumbull on November 16, 2010.

9 On November 23, 2010 an Information was filed against
10 Defendant alleging a violation of 8 U.S.C. § 1326. Defendant
11 was arraigned on that Information on December 8, 2010. On that
12 date Defendant waived his right to an Indictment in open court
13 and after being advised of the nature of the charge and of his
14 rights, he was arraigned on the Information charging him with a
15 violation of 8 U.S.C. § 1326, Illegal Re-Entry Following
16 Deportation.

17 Time was not excluded from the date of December 8, 2010
18 to December 21, 2010, when Defendant first appeared before this
19 Court.

20 Defendant thereafter appeared before this Court on
21 January 25, 2011, on March 1, 2011, and on April 5, 2011. Time
22 was excluded from the 70-day Speedy Trial calculation at each
23 of those hearings (from December 21, 2010 to January 25, 2011;
24 from January 25, 2011 to March 1, 2011; and from March 1, 2011
25 to April 5, 2011).

26 At his request, Defendant had new counsel appointed in
27 March. On April 1, 2011, the Government filed a stipulated
28 continuance from April 5, 2011 to April 12, 2011 to provide

1 Defendant's new counsel an opportunity to meet with Defendant.
2 Time was not excluded from April 5, 2011 to April 12, 2011.

3 At the latest hearing on April 12, 2011, the Court set a
4 trial date of May 16, 2011, and excluded time until the trial
5 for effective trial preparation. On April 28, 2011, the
6 government filed a Superseding Indictment in this case.

7 **II. Discussion**

8 **A. Motion to Dismiss the Information**

9 Defendant argues that he has a legal right to be
10 prosecuted by Indictment because the offense with which he is
11 charged is punishable by imprisonment for more than one year.
12 Fed. R. Crim. P. 7(b). However, at his arraignment on December
13 8, 2010, Defendant was advised of the nature of the charges and
14 of his rights and at that hearing he waived his right to be
15 prosecuted by Indictment and consented to prosecution by
16 Information. See Ct. Dkt. #11, 12. Therefore, no violation of
17 Defendant's right to be prosecuted by Indictment has occurred.
18 Moreover, the Government has now filed a Superseding Indictment
19 in this case, rendering Defendant's objection moot. For these
20 reasons, the Court DENIES Defendant's Motion to Dismiss the
21 Information.

22 **B. Motion to Dismiss the Indictment for Alleged Speedy Trial
23 Act Violations¹**

24 Defendant raises two Speedy Trial Act claims. First, he
25 asserts that the government did not charge him in a timely
26 manner in violation of 18 U.S.C § 3161(b). Second, he claims

27
28 ¹Although this Motion references an Indictment, as
discussed above, at the time Defendant filed this Motion he was
charged by way of Information, not Indictment.

1 that his case has not been brought to trial in a timely
2 fashion.

3 Defendant argues first that he was not charged in a
4 timely manner in violation of the time deadline set out in 18
5 U.S.C. § 3161(b). This section provides that "[a]ny information
6 or indictment charging an individual with the commission of an
7 offense shall be filed within thirty days from the date on
8 which such individual was arrested or served with a summons in
9 connection with such charges." 18 U.S.C. § 3161(b). Defendant
10 argues that the date he was "arrested or served with a summons"
11 was the date upon which the Immigration Detainer was lodged
12 against him, August 24, 2010. This however, was not an arrest,
13 it was only an Immigration Detainer. Defendant was not
14 arrested in connection with the current § 1326 charge until,
15 looking to the earliest possible date, the Complaint was filed
16 against him and he was transferred into federal custody on
17 November 16, 2010 by an executed Warrant of Arrest.

18 Since the Information was filed only seven days later on
19 November 23, 2010, the government's actions clearly fall within
20 the required thirty day window and therefore there is no
21 violation of 18 U.S.C. § 3161(b).

22 Defendant also "invokes his 6th Amendment Right to
23 Speedy Trial." Under the Speedy Trial Act, the government has
24 70 days to bring an action to trial. 18 U.S.C. § 3161(c)(1).
25 This section provides in pertinent part that:

26 In any case in which a plea of not guilty is
27 entered, the trial of a defendant charged in an
28 information or indictment with the commission of
an offense shall commence within seventy days from
the filing date (and making public) of the
information or indictment, or from the date the

1 defendant has appeared before a judicial officer
2 of the court in which such charge is pending,
whichever date last occurs.

3 18 U.S.C. § 3161(c)(1)

4 The seventy day time period may be tolled by exclusions
5 of time. As noted above, there have been several exclusions of
6 time in this case. Looking at the procedural history of the
7 case, a total of twelve days between the date Defendant was
8 arraigned and the date of the last Court appearance, April 12,
9 2011, have not been excluded from the 70-day Speedy Trial Act
10 calculation. Therefore, at the time of the last hearing,
11 fifty-eight days remained under the Speedy Trial Act.² At the
12 last hearing the Court set a trial date of May 16, 2011, still
13 within the Speedy Trial Act period, and also found that the
14 interests of justice warranted a further exclusion of time for
15 effective preparation for trial of Defendant's newly appointed
16 counsel to come up to speed on the case in order to be able to
17 bring it to trial in May.

18 C. Ineffectiveness of Previous Counsel

19 Defendant further claims that the Information should be
20 dismissed because he has failed to receive his state criminal
21 court files which he had requested from his prior attorney,
22 Daniel Barton. Defendant's former counsel Barton was relieved
23 as attorney as record and, on March 22, 2011, Robert Carey was
24 appointed as Defendant's new counsel. There have been no
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26 ² Even assuming that the reference in 18 U.S.C. § 3161(c)
27 to defendant's "appearance before a judicial officer" refers
back to his appearance on the Complaint (November 16, 2010),
28 and not to the date when he was arraigned on the Information
(December 8, 2010), the Court finds that there would still be
no Speedy Trial Act violation.

1 rulings on any motions in the state case, nor has Defendant
2 pled. The relevance to this case of these files at this stage
3 of the proceedings has not been established, and it does not
4 appear that any actions have been taken whereby Defendant could
5 have been prejudiced by this alleged failure. Finally,
6 Defendant's claims in this regard are conclusory only.

7 There is no set of facts before this Court, even if they
8 were true, which would require a dismissal of the Information
9 based on ineffectiveness of Defendant's former counsel. See
10 United States v. Briggs, 623 F.3d 724, 728 (9th Cir.
11 2010)(conclusory allegations insufficient to show
12 ineffectiveness of counsel). Additionally, Defendant has new
13 counsel and his case is set for trial. The Court finds that
14 ineffective assistance of counsel claim is without merit.

15 III. Conclusion

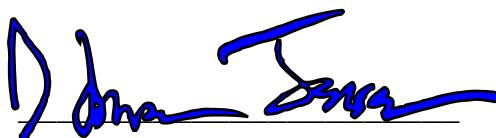
16 For the reasons stated above, Defendant's Motion to
17 Dismiss the Information; Motion to Dismiss the Indictment; and
18 Motion for a Ruling are all DENIED.

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20 IT IS SO ORDERED.

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22 Dated: May 5, 2011



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24 D. Lowell Jensen
25 United States District Judge
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